From: J. Kevin Hunt
To: Grp. City Council and City Web Site
Subject: Thanks to Alderman von Lossberg
Date: Thursday, April 29, 2021 6:57:52 AM

Dear Mayor and City Council:

This essay is in honor of the efforts of Missoula City Council Ward 1 Alderman Bryan von Lossberg, who doggedly pursued common-sense municipal firearm ordinances notwithstanding significant opposition and even a degree of personal risk arising from Mont. Const. art. II, §12 strict constructionists. The Montana Supreme Court invalidated an ordinance he pushed to adoption, closing the 'gun show loophole' within the city limits.

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ON THE DECISION OF THE SUPREME COURT TO TAKE UP A CASE PRESENTING THE QUESTION WHETHER THE SECOND AMENDMENTS CONFERS A PERSONAL RIGHT TO KEEP OR BEAR FIREARMS MUCH MORE EXPANSIVE THAN THAT PRONOUNCED IN THE HELLER RULING.

by J. Kevin Hunt

Both the most extreme strict gun control advocates and extreme "personal-right-to-own-anything-expelling-lead" promoters have erroneous understandings of the intent and purpose of the Second Amendment.

The late "originalist" Supreme Court Justice Antonin Scalia — the author of the Heller opinion that for the first time since adoption of the Bill of Rights held that the 2nd Amendment guarantees a personal right to have a gun (specifically, a handgun, for personal/household defense) – was wrong. But Heller is now the law of the land. It did not, however, follow from the "originalist" juridical philosophy unless the self-described originalists stipulate that their methodology includes the step of identifying and citing only to historic evidence putatively supportive of the desired result, while ignoring that which refutes that result.

The purpose and intent of the Second Amendment was to protect the sovereignty of the several States and citizen liberty by obviating the need for a standing army. By guaranteeing states' rights to well-regulated militias, the justification for a national standing army was vitiated. The colonists' experience of a standing body of British troops enforcing the decrees of George III led a newly independent united States of America to include in 1777 the following language in Article VI, ¶ 4 of the nation's first federal governing document, the Articles of Confederation and Perpetual Union ratified by the states in 1781:

"No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state;"

and continued:

"...but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition and camp equipage."

The verbosity of the Articles of Confederation was substantially reduced in the Constitution that replaced the Articles of Confederation. Article II, section 2 of the Constitution provided in relevant part:

"...The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States..."

Prior to adoption of the Bill of Rights, the Constitution placed no limitation on a national standing army, and the Anti-Federalists led by Virginians demanded a Bill of Rights to restrain the federal government from oppressing the states or any of them.

In what became the Second Amendment to the Constitution, the right of each state to maintain an armed militia is worded this way:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

This is immediately followed in the Bill of Rights by the Third Amendment, which reads:

"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

It is thus evident that the intent of the second Constitutional Convention in proposing, and of the states in ratifying, the Bill of Rights was, with respect to arms, that:

(1) there be no national standing army;

(2) each state have the right to a well-regulated militia, which was deemed "essential to the security of a free State.'

At the time of adoption of the Constitution and the Bill of Rights, states and townships commonly banned the carrying of arms within township limits. The right to "keep and bear arms" belonged to militiamen volunteering for the defense of their states (and of the United States when called into national service by the President). Townships commonly required all white, able-bodied males between age 21 and an upper limit to serve in the state militia.Mitiamen were required to stow their arms "in public stores."

State and/or local laws often provided that a white male inhabitant could keep a field piece at his dwelling house for defense against "Indian invasion."

Heller thus might be a defensible decision if limited to its facts and specific holding.

A right to overtly or covertly carry a dangerous or deadly weapon, especially in settled areas, was generally neither recognized by law nor as a requirement of the Second Amendment.

That the states understood this, is reflected in the language of many state constitutions that do establish a personal right by providing that their residents may keep and bear arms "for the defense of themselves and the State."

See, for example, Article II, section 12 of the Montana Constitution:

"Right to bear arms. The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."

Nothing in the Second Amendment
prohibits a Montana municipality such as Missoula from ordaining laws that, for example, mandate a background check of a person desiring to buy a gun at a gun show, or from adopting other firearm regulatory laws that are not inconsistent with state statute. The language of Mont. Const. art. II, $12 that the "right of any person to keep or bear arms in defense of his own home, person, and property ... shall not be called in question" does on its face appear by its express language to preclude the state and local government from prohibiting anyone from keeping or bearing arms other than concealed weapons, on any basis. The Montana Supreme Court has never yet held that this language must be applied strictly and literally. On its face, it is certainly problematic.